

Corporate & Financial Weekly Digest

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Delaware Chancery Rejects Purported Agreement Extending Court-Ordered Deadline

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The Court of Chancery of Delaware ruled that counsel failed to establish "excusable neglect" when it requested additional time to submit an expert witness report after the deadline for that report—as provided for in the court's previously issued scheduling order—had expired.

The litigation at issue concerned the wind-down and asset sale of Integrated Fuel Cell Technologies. In July 2010, the court entered a scheduling order at the parties' request which, among other things, set deadlines for expert reports and the completion of expert depositions. Thereafter, the parties ran into scheduling difficulties. According to plaintiff's counsel, an oral agreement was reached with defendants extending the deadline for expert reports. Plaintiff later moved to extend the time for expert reports on the basis of that agreement.

The Delaware Chancery Court emphasized that because the motion was made after the deadline set forth in the scheduling order, it required a showing of "excusable neglect" and not merely "good cause." According to the court, plaintiff failed to establish excusable neglect for several reasons.

First, defendants disputed that any agreement had been made, and plaintiff failed to reduce the purported agreement to writing (which had been the parties' consistent practice for discovery agreements throughout the litigation). Second, even if an agreement had been made, plaintiff never moved to amend the scheduling order and "[i]nformal agreements among counsel do not operate, *ex proprio vigore*, to modify a Court's order." Third, plaintiff did not serve its expert report until one full week after the deadline set in the disputed oral agreement ("in a rather brazen display of chutzpah", according to the court). Finally, the court concluded that allowing the late expert report would prejudice the defendants' trial preparation effort. (*Encite LLC v. Soni, et al.*, Civil Action No. 2476-CC, 2011 WL 1565181 (Del. Ch. Ct. Apr. 15, 2011))

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